

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP417-CR

Cir. Ct. No. 2002CF574

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JESS K. QUINN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 PER CURIAM. Jess K. Quinn has appealed from a judgment convicting him of twenty-five counts of failure to pay child support, and from an order denying his motion for postconviction relief. We affirm the judgment and order.

¶2 Quinn's first argument is that the trial court erroneously sentenced him to consecutive periods of probation. A trial court may not order that a term of probation be consecutive to another term of probation. *See State v. Pierce*, 117 Wis. 2d 83, 85, 342 N.W.2d 776 (Ct. App. 1983). However, a sentencing court may impose probation consecutive to a sentence. *Id.* It may also impose a probation term concurrent to a prison sentence. *State v. Aytch*, 154 Wis. 2d 508, 511-12, 453 N.W.2d 906 (Ct. App. 1990).

¶3 The trial court did not violate these provisions. It sentenced Quinn to consecutive one-year prison terms for the first four counts. It withheld sentence on counts thirteen through fifteen, and placed Quinn on ten years of probation for those counts, concurrent to the prison terms for counts one through four. It withheld sentence on the remaining counts, five through twelve and sixteen through twenty-five. It placed Quinn on ten years of probation for these counts, consecutive to the prison terms for counts one through four.

¶4 The prison sentences are the anchor for the sentencing structure. All terms of probation are either concurrent to the prison sentences, or consecutive to them. Because a trial court may impose probation concurrent or consecutive to a prison sentence, no basis exists to disturb the terms of probation ordered in this case.

¶5 Quinn's next argument is that the trial court erroneously exercised its sentencing discretion by imposing a sentence designed to punish him for uncharged crimes of tax evasion and sexual misconduct with a child. We conclude that the trial court acted within the scope of its sentencing discretion.

¶6 Sentencing is left to the discretion of the trial court and appellate review is limited to determining whether there was an erroneous exercise of

discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. “When the trial court has properly exercised its discretion, we follow a consistent and strong policy against interference with the discretion of the trial court, and we afford a strong presumption of reasonability to the court’s sentencing determination because the court is best suited to consider the relevant factors and demeanor of the convicted defendant.” *State v. Ziegler*, 2006 WI App 49, ¶22, ___ Wis. 2d ___, 712 N.W.2d 76, *review denied*, 2006 WI 39, ___ Wis. 2d ___, ___ N.W.2d ___.

¶7 The principal objectives when imposing sentence include, but are not limited to, protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *Id.*, ¶23. The primary sentencing factors that a trial court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Id.* Other factors that may be relevant to sentencing include, but are not limited to, the defendant’s past criminal record and history of undesirable behavior patterns; his [or her] personality, character and social traits; the presentence investigation report; the defendant’s culpability for the crime and its vicious or aggravated nature; the defendant’s demeanor, age, educational background and employment record; the defendant’s remorse, repentance and cooperativeness; the rights of the public; and the defendant’s need for close rehabilitative control. *Id.*

¶8 In evaluating a defendant’s character, a trial court may consider uncharged or unproven offenses as evidence of a pattern of behavior and character. *Elias v. State*, 93 Wis. 2d 278, 284, 286 N.W.2d 559 (1980). Quinn acknowledges that the trial court was entitled to consider his failure to pay taxes and the allegations against him concerning underage females as they relate to his character and the protection of the public. However, he contends that the trial

court exceeded the scope of its authority and sentenced him for the uncharged crimes.

¶9 Based upon our review of the trial court's sentencing decision, we reject Quinn's argument. The trial court gave a detailed and lengthy explanation of its sentencing decision, discussing the primary sentencing factors and the secondary factors relevant to the primary factors. It considered Quinn's positive attributes, including his employment history, intelligence, positive demeanor, and lack of prior criminal convictions. However, it also considered Quinn's culpability for his lengthy failure to support his child, the seriousness of failure to support, and the effect of the crimes on the child, the child's mother, and society. It concluded that close rehabilitative control was necessary to change Quinn's attitude toward his responsibility for paying support. Based upon these factors, it concluded that incarceration and lengthy probation were required.

¶10 Contrary to Quinn's contention, in its sentencing decision the trial court did not dwell on Quinn's admitted failure to pay taxes and his inappropriate contact or correspondence with two early- or pre-adolescent girls. The trial court indicated that it was not its role to sentence Quinn for these activities, or to protect the public from his failure to pay taxes. It limited its consideration of these activities to its assessment of Quinn's ability to pay support, and his character and social traits, concluding that the activities evinced a willingness to violate the law. The trial court's conclusions were reasonable, and were properly considered by it in determining Quinn's sentence. No basis therefore exists to disturb its sentencing decision.

¶11 Quinn's final argument is that he is entitled to a new trial because his claim of inaccuracies or omissions in the trial transcript constitutes a colorable

claim of prejudicial error. In support of this argument, Quinn relies on his postconviction affidavit and testimony, alleging that the transcript of the August 4, 2003 hearing on a pretrial motion in limine does not accurately reflect the trial court's statements and his response. Based on his testimony that the transcript is inaccurate, Quinn contends that he is entitled to a new trial under *State v. DeLeon*, 127 Wis. 2d 74, 377 N.W.2d 635 (Ct. App. 1985).

¶12 Quinn's reliance on *DeLeon* is misplaced. In *DeLeon*, 127 Wis. 2d at 76, trial court proceedings were recorded, but the reporter's notes for a portion of the proceedings were lost. In contrast, the court reporter's notes are not lost or missing in this case. Quinn merely contends that the court reporter did not accurately transcribe what transpired at the August 4, 2003 proceeding.

¶13 At the postconviction hearing, Quinn testified concerning his version of what was said at the August 4, 2003 proceeding. The court reporter who recorded the August 4, 2003 proceeding also testified. She testified that the transcript was typed from her notes, and that her notes comprise a verbatim account of what was stated in court. She testified that the transcript reflected what was said in the courtroom, and that her notes do not support Quinn's claim that something different was said.¹

¶14 The trial court denied Quinn's motion, finding that there was nothing missing from the record and that no basis existed to believe that the transcript was inaccurate. The trial court thus implicitly believed the testimony of the court

¹ She also testified that if proceedings were off the record, her notes would reflect that the trial court went off the record.

reporter who recorded the August 4, 2003 proceeding rather than the testimony of Quinn.

¶15 The determination of the credibility of the witnesses at the postconviction hearing was for the trial court. See *State v. Kimbrough*, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. A trial court's factual findings will not be disturbed unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.* 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). Because the court reporter's testimony supports the trial court's finding that the August 4, 2003 transcript was accurate, no basis exists to disturb the trial court's order denying postconviction relief.²

By the Court.— Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

² In making this determination, we reject Quinn's contention that the trial court judge impermissibly ruled on his own credibility. The trial court merely stated that it did not independently recall what was said during the August 4, 2003 proceeding. In determining that the transcript of the August 4, 2003 proceeding was accurate, it relied on the testimony of the court reporter, implicitly finding credible her testimony that the transcript constituted a verbatim account of what was said.

